Supreme Court, U.S.
FILED
MAR 23 1998
CLERK

No. 97-1259

In The

Supreme Court of the United States

October Term, 1997

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY,

Petitioner,

vs.

WASTE MANAGEMENT, INC. OF TENNESSEE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Waste Management, Inc. of Tennessee is a wholly owned subsidiary of Waste Management of North America, Inc. (formerly named Waste Management, Inc.), which is a wholly owned subsidiary of Waste Management, Inc. (formerly named WMX Technologies, Inc.).

Waste Management, Inc. of Tennessee has no nonwholly owned subsidiaries.

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FACTS OF THE CASE

The parties have stipulated to the facts relevant to this case. Petitioner, Metropolitan Government of Nashville and Davidson County ("Metro"), seeks a writ of certiorari for review of a portion of the decision of the United States Court of Appeals for the Sixth Circuit in *Waste Management, Inc. of Tennessee v. Metropolitan Government of Nashville and Davidson County*, 130 F.3d 731 (6th Cir. 1997). Metro seeks a reversal of the Sixth Circuit's holding that its flow control regulations violate the Commerce Clause of the United States Constitution.

The flow control regulations require, in pertinent part, that all companies collecting, hauling, or removing residential waste within Metro dispose of such residential waste at the Nashville Thermal Transfer Plant ("Thermal"), a waste-to-energy facility owned by Metro and operated by the Nashville Thermal Transfer Corporation ("NTTC"). The flow control regulations also mandate that waste collectors supply unlimited quantities of non-residential waste to Thermal in varying amounts based upon Metro's weekly determination of the amount of solid waste needed to meet Thermal's daily operating needs.

Respondent, Waste Management, Inc. of Tennessee ("WMIT"), one of three major solid waste collectors licensed to do business within the boundaries of Metro, sought to enjoin the enforcement of the flow control regulations. In addition to collecting solid waste, WMIT owns and operates a transfer station in Davidson County, which forwards solid waste to two landfills in Benton County, Tennessee and Logan County, Kentucky. The landfill located in Benton County is operated by WMIT. At times, Metro's weekly allotments to WMIT have exceeded twenty percent of the total amount of all of the solid waste collected by WMIT in Davidson County. The regulations which WMIT challenges, however, permit Metro to flow control

all of the waste collected by WMIT in Davidson County. In support of its request for an injunction, WMIT offered proof that continued enforcement of Metro's flow control regulations and weekly waste allotments would force it to close its transfer station and the Benton County landfill.

PROCEEDINGS BELOW

The Sixth Circuit analyzed the flow control regulations and held that they were discriminatory because

> they require that all residential waste be sent to NTTC, thereby preventing plaintiff from disposing of such waste at a cheaper facility, and threatening the well-being of plaintiff's own dump sites.

Waste Management, 130 F.3d at 736. It found that the flow control measures "hoard[ed] solid waste, and the demand to get rid of it, for the benefit of the preferred processing facility." *Id.* (quoting *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 392 (1994)).

Because "such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose," *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979), Metro was required to show that it had no other means to advance a legitimate local interest. Metro conceded "that it could secure a flow of waste to NTTC by increasing its collections directly or by contract," *Waste Management*, 130 F.3d at 736, but complained that to do so would be time-consuming and require legislative action. The Sixth Circuit found that viable alternatives are available to Metro, and, consequently, struck down the flow control regulations as violating the Commerce Clause, reversing the district court's refusal to enjoin the enforcement of them.

REASONS FOR DENYING THE WRIT

Rule 10 of the Supreme Court Rules requires "compelling reasons" for granting certiorari, and sets forth three categories of cases that deserve discretionary review on certiorari. None of the reasons offered by Metro in its Petition bring this case within one of those three categories, or otherwise satisfy this Court's demanding standards for accepting a case for review.

The first basis for granting certiorari, listed in Rule 10(a), is that a federal court of appeals has ruled contrary to another federal court of appeals or state court of last resort. As Metro has been unable to identify a single circuit court of appeals or state court of last resort that has excused Commerce Clause discrimination that favors a public entity, either in its holding or in dicta, there is no basis for granting certiorari under Rule 10(a). Clearly, this case does not present "a real and embarrassing conflict of opinion and authority between the circuit courts of appeal," *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951), and does not warrant review by this Court. As this Court has stated, "the absence of any conflict among the Circuits is plainly a sufficient reason for denying certiorari." *Singleton v. Comm'r of Internal Revenue*, 439 U.S. 940, 945 (1978) (Stevens, J., opinion in denial of certiorari).

The second basis for granting certiorari is listed in subsection (b) of Rule 10, and contemplates a ruling from "a state court of last resort [that] has decided an important federal question" that conflicts with another state court of last resort, or a federal court of appeals. Sup. Ct. R. 10(b). As this case asks that a writ be issued to the United States Court of Appeals for the Sixth Circuit, subsection (b) of Rule 10 clearly has no application to this Petition.

The final basis for granting certiorari, and the only possible basis upon which Metro could rely as grounds for this Court granting its Petition, is that the Sixth Circuit decided an important question of federal law in a way that (1) "has not been, but should be, settled by this Court"; or (2) "conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). Metro claims that certiorari is warranted because the Sixth Circuit ignored this Court's rulings in *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 504 U.S. 353 (1992) and *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994). *Petitioner's Brief* at 8. Alternatively, Metro contends that the Sixth Circuit's ruling conflicts with "implicit guidance in the existing relevant decisions of this Court. . . ." *Id.*

However, both arguments fail for the reason that, in diligently mining prior decisions of this Court for "implicit" guidance, Metro has ignored the rather *explicit* holdings of those cases. While Metro correctly points out that both *Carbone* and *Fort Gratiot* contain some language discussing a distinction between privately owned and operated disposal sites and similar sites that are publicly owned, it fails to note that such language appeared primarily in dissenting opinions, and that this distinction failed to sway a majority of the Court. As such, the "public-private" distinction urged by Metro has indeed been previously considered — and rejected — by this Court.

Metro asserts that *dicta* in *Fort Gratiot* "specifically reserved judgment on flow control measures affecting publicly owned and operated facilities." *Petitioner's Brief* at 10. However, a careful examination of that decision dispels Metro's reading:

> Before discussing the rather narrow issue that is contested, it is appropriate to identify certain *matters that are not in dispute*. Michigan's comprehensive program of regulating the collection, transportation, and disposal of solid waste . . . is not challenged.

> No issue relating to hazardous waste is presented, and there is no claim that petitioner's operation violated any health, safety, or sanitation requirement. Nor does the case raise any question concerning *policies* that municipalities or other governmental agencies may pursue in the *management of publicly owned facilities.*

Fort Gratiot, 504 U.S. at 358-59 (emphasis added). At issue in *Fort Gratiot* was a form of flow control: whether a Michigan statute could bar private landfill owners from accepting out-of-county solid waste. The italicized language in the last sentence quoted above refers to the ability of a city or county to purchase and manage its own solid waste facility. For example, a publicly owned facility may establish a policy to reject out of county waste at its facility. In any event, the management policies of a publicly owned waste facility are not synonymous with flow control legislation.

Metro claims that *Fort Gratiot* authorizes a government to discriminate against interstate commerce for its own benefit, although it may not do so to aid local businesses. This Court previously has ruled, however, that it makes no difference that the intention behind a discriminatory law is benign, or whether a government acts in the interests of local business, itself, or its citizens in enacting discriminatory measures:

> [T]he evil of protectionism can reside in legislative means as well as ends. Thus, it does not matter whether the ultimate aim of [the statute] is to reduce the waste disposal costs of New Jersey residents or to save remaining open lands from pollution. . . . But whatever New Jersey's ultimate purpose, it may not be accompanied by discriminating against articles of commerce coming from outside the State. . . .

Fort Gratiot, 504 U.S. at 360 (quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 626-27 (1978)). The Court in *Fort Gratiot* then cited several examples of where "a presumably legitimate goal was sought to be achieved by the illegitimate means of isolating the State from the national economy." 504 U.S. at 360.

Metro's citation of *C & A Carbone, Inc. v. Town of Clarkstown* as support for its "public facility exception" to the Commerce Clause is both unpersuasive and contradictory.[1] First, Metro argues that this case is not governed by *Carbone* and recites a litany of superficial distinctions between the specific facts of each case. *Petitioner's Brief* at 8-9. Metro concludes by asserting that "the single most important distinction is that the transfer station in *Carbone* was not governmentally owned, unlike the waste-to-energy facility in the case at bar." *Id.* at 9.

Having made this distinction, Metro relies almost entirely upon Justice Souter's dissent in *Carbone*, which characterized the transfer station in that case as "essentially a municipal facility" and its operator as "essentially as an agent of the municipal government." *Carbone*, 511 U.S. at 419, 416. Metro claims that Justice Souter's dissent should be treated as governing law instead of the majority opinion, arguing that

> [t]he majority opinion in *Carbone* does not contradict [Souter] because it does not expressly address the issue since technically the transfer station in *Carbone* was not municipally owned and operated.

Petitioner's Brief at 15.

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1. Metro also briefly discusses the Sixth Circuit's decision in *Hybud Equipment Corp. v. City of Akron*, 654 F.2d 1187 (6th Cir. 1981), but that case's chief virtue is that it predates *Carbone* and *Fort Gratiot* by more than a decade. To the slight extent that flow control and the Commerce Clause was addressed in *Hybud*, its holding has since been supplanted by *Carbone* and *Fort Gratiot*.

In fact, the transfer station in *Carbone* was nominally and temporarily owned by a contractor for five years, as a means of creative financing. 511 U.S. at 387. The town of Clarkstown, New York used flow control as a financing measure that enabled it to build a solid waste transfer station on the site of its recently closed landfill. Rather than issue municipal bonds or assess a general tax, the town financed the $1.4 million facility by giving the private contractor a five-year contract to operate the facility, charging a fee to waste haulers in excess of the market rate. *Id.* After five years, the town was to buy the facility from the contractor for one dollar.[2] *Id.* The Court noted that, "as the most candid of *amici* and even Clarkstown admit, the flow control ordinance is a financing measure." *Carbone*, 511 U.S. at 393.

More importantly, the minutiae of public or private ownership is irrelevant, particularly to those whom the dormant Commerce Clause doctrine was intended to protect the interests who are disadvantaged by protectionist legislation. An examination of the Court's discussion of the dormant Commerce Clause in *Carbone* indicates that the identity of the interests *discriminated against* is more significant than whether the benefits of the discriminatory legislation accrue to private business or the government itself.

> The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is *local economic protectionism*, laws

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2. Metro does admit that "the transfer station in *Carbone* lies closer on the continuum to a publicly owned facility than did the landfill in *Fort Gratiot*." *Petitioner's Brief* at 11. Regardless of how Metro would like to define that continuum, it was certainly a temporary one, because the contractor's five-year contract ended in 1994, rendering the transfer station a public facility. *Carbone*, 511 U.S. at 386-87.

> that would excite those jealousies and retaliatory measures the Constitution was designed to prevent.

Carbone, 511 U.S. at 390 (emphasis added). The fact that discriminatory measures are enacted to benefit a governmental entity rather than local industry does not lessen the resulting economic Balkanization and retaliation.

The critical language in *Carbone* seems almost to have been drafted in anticipation of this case:

> The flow control ordinance . . . hoards solid waste, and the demand to get rid of it, for the benefit of the preferred processing facility. The only conceivable distinction from the cases cited above is that the flow control ordinance favors a single local proprietor. But this difference just makes the protectionist effect of the ordinance more acute. . . . The flow control ordinance at issue here squelches competition in the waste processing service altogether. . . .
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> * * *
>
> The flow control ordinance does serve a central purpose that a non-protectionist regulation would not: It ensures that the town-sponsored facility will be profitable. . . .

Carbone, 511 U.S. at 392-93.

In sum, this Court's final words in *Carbone* are a terse and fitting coda for this case as well. "State and local governments may not use their regulatory power to favor local enterprise by prohibiting patronage of out-of-state competitors or their facilities." *Carbone*, 511 U.S. at 394. That is precisely what

Metro attempted to do through its flow control regulations, and, as such, the Sixth Circuit correctly held Metro's flow control regulations violative of the Commerce Clause of the United States Constitution.

CONCLUSION

Petitioner has failed to present any issues sufficient to invoke the certiorari jurisdiction of the Supreme Court of the United States. For that reason, and for all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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